

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.01.2020

CORAM

THE HON'BLE MR. JUSTICE R.MAHADEVAN

Criminal Appeal No.752 of 2019  
and CrI.M.P.No.15870 of 2019

S.Shami @ Shamiyullah

....Appellant/A-5

Versus

The State, Represented by:

Intelligence Officer,  
Director of Revenue Intelligence,  
Chennai Zone Unit,  
Chennai 600 017

(DRI/F.No.VIII/48/5/2011-DIR)

.... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure against the judgment of learned Special Judge, II Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, passed in C.C.No.17 of 2011, dated 23.10.2019.

For Appellant : Mr. R.Sankarasubbu

For Respondent: Mr. N.P.Kumar,  
Special Public Prosecutor  
(NCB Cases)

JUDGMENT

This Criminal Appeal arises out of the judgment dated 23.10.2019 passed by the learned Special Judge, II Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, in C.C.No.17 of 2011.

2. The case of the prosecution is that the Superintendent of DRI, Chennai (PW1), on 26.02.2011, received an information over phone at 10.30 am that huge quantity of Ketamine is smuggled in a small transparent polythene cover, each weighing 10 grams concealing with silver foils, among other goods, under

Shipping Bill No.4088865 dated 25.02.2011, in the sachets printed as "Herbal Black Henna, Pure Rich, Natural cultivated Henna, net weight 10 grams"; it was further informed that one Kader Rasool of Ilayangudi and one Swaminathan of Thiruvarankurichi have smuggled Ketamine, along with the consignment in the Shipping Bills referred to above; PW1 along with other officers went to M/s.Container Corporation of India Limited with Kader Rasool, who appeared before them, on receipt of summons and found 146 packs and out of them, three were with suspicious word "K.R." and the total weight of substance is 33.560 Kgs; upon test, it was identified as Ketamine; the Intelligence Officer of DRI, Chennai (P.W.3) recorded the confession statement of Kader Rasool and Abdul Salam, who later arrayed as A-1 and A-2 respectively, arrested them and remanded to judicial custody; thereafter, P.W.3 filed Section 57 report to P.W.1 and recorded the statements of Sathya Murthy and Arunachalam, and visited the father-in-law's house of the appellant herein and on the search of the same, nothing was recovered; on receipt of the summons, A-5 appeared before DRI and gave his statement. Upon completion of investigation, complaint was filed on 17.05.2011.

3. Initially, the complaint was filed against six accused and the same was taken on file as C.C.No.17 of 2011. Subsequently, A-5 (appellant herein) appeared and executed a bond under Section 88 Cr.P.C. On 11.04.2014, the trial court ordered for split up of the case against A-3, A-4 and A-6 as NBWs were pending against them and even their addresses were not mentioned in the complaint. The said case against A-3, A-4 and A-6 was numbered as C.C.No.22 of 2014 and is pending. Subsequently, as per the order dated 10.10.2014, passed by this Court in CrI.R.C.No.893 of 2014, the Court below, on 29.12.2014 ordered for split up of the case against A-1 and A-2 who intended to admit their guilt.

4. In CC.No.17 of 2011, trial was commenced against the appellant/A5. He was questioned under Section 313 Cr.P.C as to the incriminating materials against him and he denied the same as false. Neither any witnesses were examined nor any documents were marked on the side of the accused.

5. On receipt of the summons, A-5 entered appearance and after hearing the arguments of both sides, the Court below framed charges under Section 8 (c) r/w 29 (1) of the NDPS Act against the appellant herein (A-5). The prosecution has

examined P.Ws.1 to 6 and marked Exs.P-1 and P-52, apart from the Materials Objects I to XLII.

6. P.W.1-Superintendent of Central Excise is the seizure Officer. He has deposed in detail about the information received by him on 26.02.2011, apart from search, recovery and the mandatory procedures followed by him during search.

6.1. P.W.2-Superintendent of Central Excise is the Officer, who received the information on 28.02.2011 regarding the illegal export of Ketamine.

6.2. P.W.3-Intelligence officer, who accompanied P.W.1, during search, has recorded Section 67 statement of A-5.

6.3. P.W.5-Scientific Officer has conducted the test on the recovered materials. Her report was that the sample was Ketamine, a Psychotropic Substance.

6.4. P.W.6-Superintendent of GST and Central Excise is the Officer, who recorded Section 67 statement of one Murugesan, M/s.Meenakshi International.

6.5. Out of the six witnesses, A-5 has not cross-examined P.Ws.1, 2, 5 and 6, but cross-examined P.W.3 with respect to recording of Section 67 statement alone. It is not the case of A-5 that any of the provisions of the NDPS Act were violated by the Seizure Officer.

7. On an appreciation of materials before it, the trial Court, under judgment dated 23.10.2019 found the appellant herein / A-5 guilty under Section 29 (1) of the NDPS Act and sentenced him to undergo six months Rigorous Imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo Rigorous Imprisonment for three months. Aggrieved against such finding, the present Criminal Appeal has been filed by the appellant.

8. The learned counsel for the appellant / A-5 submitted that the trial Court has overlooked the decision rendered by the Supreme Court, in the case of Mohammed Fasrin v. State, Rep. By the Intelligence Officer (Crl. Appeal No.296 of 2014) and convicted the appellant only based on the confession statement of the co-accused. He further submitted that the charge under Section 29 of the NDPS Act is not maintainable against the appellant, as during 2010, Ketamine is not a substance as prohibited under the Act and hence, the appellant ought to have been acquitted from the said charge. Placing reliance on the judgment of the Court below passed in CC No.71/2014, the learned

counsel submitted that A1 and A2 were acquitted from the very same offence under Section 29(1) of the NDPS Act and hence, the said benefit may be extended to the appellant as well. For better appreciation, the relevant portion of the said judgment is extracted hereunder:

"The prosecution alleged in the complaint that there was hatching of conspiracy among the accused between December 2010 to February 2011. The specific case of the prosecution is that the accused herein had conspired with others to carry out the illicit-trafficking of Ketamine, a Narcotic Drug. This Court verified the notification issued by the Central Government on 10.2.2011. The notification reads that Ketamine was declared as a Narcotic Drug and included in the schedule of prohibited drugs as 110(A). The possession of Ketamine before 10<sup>th</sup> February 2011 was not an offence. Therefore this Court decides that even if the allegations that both the accused had dealt with Ketamine before 10.2.2011 the same cannot be construed as an offence and there was no provision to punish the possession of Ketamine, before 10<sup>th</sup> February 2011. Therefore, this Court has decided to acquit the accused A1 and A2 from the charges u/s.8(c) r/w 29 of the NDPS Act."

Thus, according to the learned counsel, the judgment of conviction and sentence passed against the appellant is liable to be set aside.

9. The learned Special Public Prosecutor appearing for the respondent submitted that the trial Court has considered all the aspects and also placed reliance on the materials available on record and has rendered conviction and sentence against the appellant. He further submitted that the seizure of Ketamine, a narcotic substance, has been proved through the evidence of P.Ws.1 to 6 and the accused has countersigned the seizure mahazar; in such a scenario, the prosecution, having proved the seizure of the contraband beyond reasonable doubt, the judgment of the trial Court cannot be assailed. He also submitted that the Officers of the respondent / complainant have followed all the rules and regulations as stipulated under the Act and to controvert the same, the appellant has not adduced any evidence. Thus, according to the learned Special Public Prosecutor, this appeal has to be dismissed.

10. This Court considered the rival submissions and bestowed its best attention to the materials available on record.

11. The allegation levelled against the appellant is that the Psychotropic substance was concealed in Henna Hair Dye Packet in the house of the petitioner and recovered subsequently, when it was booked for export to Malaysia.

12. The first and foremost contention of the learned counsel for the appellant is that the appellant was implicated as A5 in this case only based on the confession statement of co-accused; since the statement of the co-accused cannot be treated as admissible in evidence, the judgment of conviction passed against the appellant is liable to be set aside.

13. It is true that the appellant was arrayed as accused based on the confession statement of A1 Kader Rasool, who categorically stated about the concealment of consignment in Henna Hair Dye Packet in the house of the appellant for the purpose of exporting the same to Malaysia. For better appreciation, the relevant portion of his confession statement is extracted as under:

"மலேசியாவிற்கு கடத்த முடிவு செய்யப்பட்டது மேற்கண்ட சரக்கு திரு.மொட்டை நைனா, திரு.ஆஷிக், திரு.உஷி மற்றும் எனக்கு சொந்தமானது மேற்கண்ட 34 மப கெட்டமைனை திரு.உஷி வீட்டில் வைத்து முநியே முயசை னுலந யஉமநவ அடைக்கப்பட்டது. இந்த முறையும் கெட்டமைன் அடைக்கப்பட்ட Henna Hair Dye Packet மற்றும் அகர்பத்திகள் மொத்தம் பதிநான்கு பெட்டிகள் திரு.சுவாமிநாதன் என்கின்ற சலாம் மூலமாக திரு.முருகேசனிடம் மலேசியாவிற்கு ஏற்றுமதி செய்வதற்கு அளிக்கப்பட்டது."

Admittedly, he has not retracted the said statement. Further, the confession statement of A1 was corroborated by the statement of the appellant, who admitted his guilt in Section 67 statement, which is voluntary. He has not filed any application till the completion of trial to the effect that he has retracted the said statement, which goes to show that such statement is voluntary and admissible in evidence. There can be no doubt that the confession of the accused under Section 67 of the Act is very much admissible in evidence, provided the said statement is voluntary.

14. That apart, on a perusal of the impugned judgment, it is seen that the appellant/A5 has provided reasonable

opportunity to adduce evidence as well as cross examine the witnesses. He did not cross examine P.Ws.1, 2, 5 and 6, but cross examined PW3 only with respect to recording of Section 67 statement alone and did not choose to put forth any question as regards the recovery of 33.560kg of Ketamine from the Carton Boxes of the export consignment to Malaysia in Shipping Bill No.4088865 dated 25.02.2011. It is also not the case of the petitioner that any of the mandatory provisions of the NDPS Act were violated by the Seizure Officer. On the other hand, the prosecution, through Exs.P1, P2 and P23 and the evidence of P.W.1 to P.W.4, has proved that the provisions of sections 42, 50 and 57 were duly complied with. Therefore, the prosecution has proved the search and recovery of 33.560 kg of Ketamine through unimpeached evidence of P.W.1 to P.W.6. It was also proved that the same was recovered in the presence of A1. Already A1 and A2 admitted their guilt and they have not retracted their confessional statements. Therefore, the contention so raised by the learned counsel for the appellant cannot be countenanced by this Court.

15. Relying on the notification dated 10.02.2011 in G.O.311 (E), wherein, Ketamine was included in the list of Psychotropic substance, the learned counsel for the appellant submitted that before 10.02.2011 the possession of Ketamine was not an offence, whereas, the psychotropic substance was recovered only on 01.03.2011, but it was booked for export to Malaysia on 25.02.2011. However, as per G.O.67 dated 27.12.2007, Ketamine can be exported only on obtaining NOC from the Narcotic Commissioner. It is not the case of the appellant that proper NOC was obtained for exporting the same to Malaysia. The time gap between the booking of consignment and issuance of notification is 15 days. Just because before 10.02.2011, the possession of Ketamine was not an offence, it cannot be said that there could not have been any conspiracy at all before 10.02.2011 or after 10.02.2011. Conspiracy may arise even at the spur of a moment of committing crime. According to the prosecution, the conspiracy was hatched between December 2010 to February 2011. Hence, the contention so raised on the side of the appellant does not inspire the confidence of this Court and is accordingly, rejected, as rightly done by the trial Court.

16. Though the accused 1 and 2 were acquitted from the offence of conspiracy on technical grounds, based on the aforesaid notification, the same cannot be treated as precedent to acquit the petitioner herein. Further, A1 and A2 were convicted for the other offences. As such, the extension of the said benefit to the appellant herein does not arise herein.

17. In ultimate analysis, this Court finds no reason much less valid reason to interfere with the judgment of conviction passed by the trial Court and hence, the same is confirmed as such.

18. As regards the punishment, the trial Court has sentenced the appellant to undergo six months rigorous imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo three months rigorous imprisonment. It is reported that the fine amount had already paid by the appellant. Considering the facts that the contraband was recovered after the date of notification, wherein, possession of Ketamine was not an offence and it was recovered only from the in-law's house of the appellant; there was no independent witness available for seizure and recovery of contraband, except official witnesses; and A1 and A2 were acquitted from the similar charge, this Court is inclined to modify the sentence alone to the extent of the period already undergone by the petitioner, besides directing him to appear before the trial Court twice a week till the completion of the period of sentence.

19. Accordingly, this Criminal Appeal is disposed of. Consequently, connected Miscellaneous Petition is closed.

20. At this juncture, the learned counsel for the appellant submitted that this day (28.01.2020) morning appellant's brother, Mr.B.Khaleelul Rahman passed away and hence prays for appropriate orders for the immediate release of the appellant.

21. In view of the above submission made by the learned counsel for the appellant, the judgment of sentence passed by the learned Special Judge, II Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, passed in CC.No.17 of 2011 on 23.10.2019, is modified upon satisfying the following conditions by the appellant:-

- (i) The appellant / A-5, namely, S.Shami @ Shamiyullah, who is now confined in the Central Prison, Puzhal, Chennai, is granted parole from 06.00 p.m. on 28.01.2020 to 06.00 p.m. on 30.01.2020;
- (ii) The Superintendent of Central Prison, Puzhal, Chennai, is hereby directed to pass appropriate orders releasing the appellant / A-5, granting permission, as aforesaid, for the purpose of attending the final rites of Mr.B.Khaleelul Rahman, who is the brother of the appellant.
- (iii) The Jail Authorities are directed to

release the appellant / A-5, S.Shami @ Shamiyullah, on production of this order.

(iv) The Jail Authorities, during the period of the above said two days, shall provide proper escort to the appellant / A-5 (who shall be in civil dress) in order to ensure the safety and security of the appellant. They shall also impose suitable conditions to that effect. The expenses of the escort shall be borne by the appellant.

(v) Before 06.00 p.m. of 30.01.2020, the appellant / A-5 is directed to execute a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties of whom, one should be a blood relative, each for a like sum to the satisfaction of the learned Special Judge, II Additional Special Court for Exclusive Trial under NDPS Act, Chennai;

(vi) The appellant / A-5 and the sureties shall affix their photographs and Left Thumb Impressions in the surety bonds and the learned Judge may obtain a copy of their Aadhaar Cards or Bank Pass Books to ensure their identities.

(vii) The appellant / A-5 shall appear before the Trial Court at 10.30 a.m. on every Monday and Thursday of the week, before the trial court, starting from 03.02.2020, till completion of the period of sentence.

(viii) On the failure of any of the conditions (v) to (vii) above by the appellant / A-5, it is open to the Trial Court to commit the appellant / A-5 into custody for undergoing the remaining period of the sentence.

Sd/-

Assistant Registrar(CS I)

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Sub Assistant Registrar

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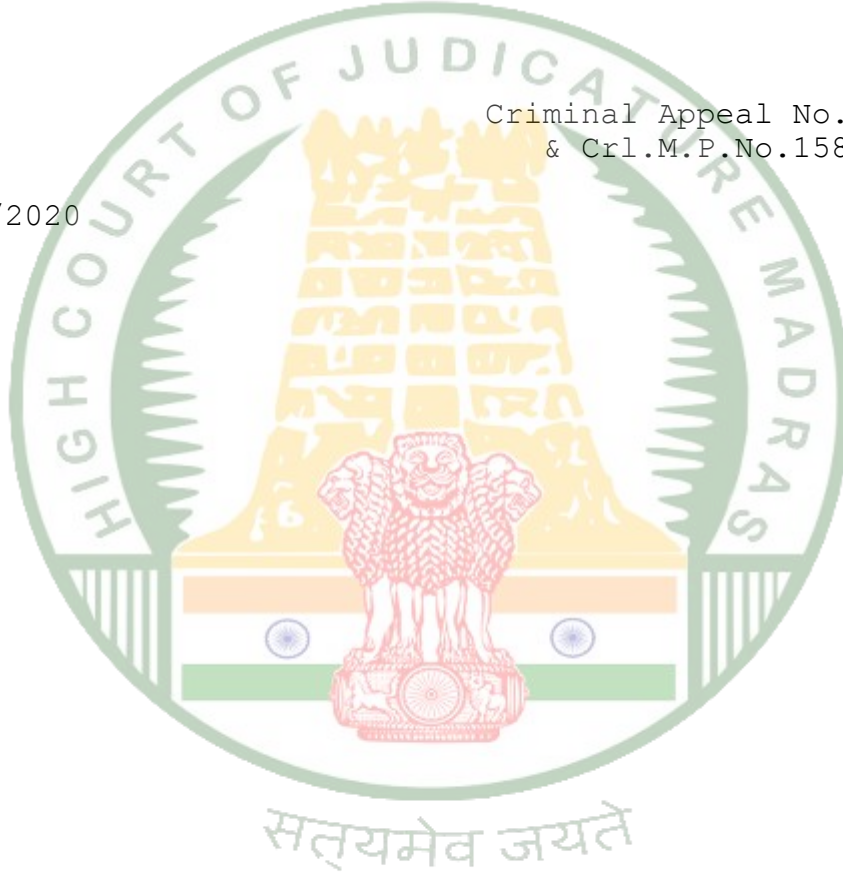
To

1. The Intelligence Officer, Director of Revenue Intelligence, Chennai Zone Unit,

- Chennai 600 017.
2. The Special Judge, II Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai
  3. The Special Public Prosecutor, High Court, Madras - 600 104. NCB Cases.
  4. The Superintendent, Central Prison, Puzhal, Chennai.
  5. The Section Officer, Criminal Section, High Court, Madras.

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& Crl.M.P.No.15870 of 2019

KKV/26/05/2020



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